Supreme Court, U.S.
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No. 91-1422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S. PAUL HOBBS, AND DONNA M. HOBBS, his wife and
PHILLIP RAY HOBBS, AND DOROTHY V. HOBBS, his wife,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal agency, that does not have permitting authority under a federal statute, may use its own standards rather than the standards of the permitting authority and maintain an enforcement action against a citizen for injunctive relief and civil penalties of millions of dollars, when the federal agency with permitting authority under the statute using its standards declines to assert jurisdiction and require the citizen to have a permit.

2. Whether a citizen's property which does not actually abut on a navigable waterway and has no wetlands adjacent to bodies of open water are "waters of the United States" subject to regulation by the Corps of Engineers and the requirement of a Section 404, Clean Water Act permit before the land can be disturbed.

3. Whether the term "neighboring" contained in the regulatory definition of adjacent wetlands is unconstitutionally void for vagueness.

4. Whether constitutional due process and the Seventh Amendment require that a citizen be permitted to assert a good faith belief in the invalidity or inapplicability of an Administrative Order issued by a federal agency, as a disputed factual issue to the jury, during the liability phase of a trial to enforce penalties of $25,000 per day for each day of violation of that Order.

PARTIES

The defendants-appellants below were individuals, S. Paul Hobbs, Donna M. Hobbs, Phillip Ray Hobbs and Dorothy V. Hobbs. The plaintiff-appellee was the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners S. Paul Hobbs, Donna M. Hobbs, Phillip Ray Hobbs, and Dorothy V. Hobbs respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears at Appendix ("App.") 1a. The final order and judgment order of the District Court are unreported and appear at App. 16a, and App. 53a respectively. The findings of fact and conclusions of law of the District Court appear at App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1991. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied on December 11, 1991. App. 95a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Fifth Amendment, Seventh Amendment and relevant provisions of the Clean Water Act of 1977, 33 U.S.C. §§ 1251, *et seq.* ("CWA") and implementing regulations promulgated by the United States Army Corps of Engineers ("Corps Regulations") and United States Environmental Protection Agency Regulations ("EPA Regulations") are reprinted at App. 134a.

STATEMENT OF THE CASE

For more than nine years before this case began, Petitioners Paul Hobbs and his father, Phil Hobbs ("Hobbs") had been converting their wooded, agriculturally zoned property in Gloucester County, Virginia, to agricultural fields under the direct supervision of the U.S. Department of Agriculture, Soil Conservation Service ("SCS"). The

SCS representatives reviewed federal wetland maps and made on site studies to satisfy their agency's requirement that wetlands did not exist. The SCS laid out the ditch system, established specifications and staked the ditches that the Hobbs were to dig. Joint Appendix filed in the Court of Appeals ("JA") 432-436. The SCS representatives inspected the work after it was done to ensure that it complied with their directions. JA 436. The ditches were improvements to existing ditches and new ditches both of which were connected to previously existing ditches, not on the Hobbs property, which ultimately empty into the Ware River after passing through other developed property and road culverts under Va. State Route 623.[1] JA 463. The Hobbs' property is located approximately ½ mile from the Ware River. JA 227. In 1980 Phil Hobbs, (JA 225) and in 1986 Paul Hobbs, (JA 224) entered into "Cooperator's Agreement" with the SCS.

In September, 1988 a Mr. Frazer of the Fish and Wildlife Service ("F&WS") came to the property and claimed Paul Hobbs "might be doing work in a non-tidal wetlands." JA 492. No other federal agency had ever made such a claim before. JA 491. Mr. Frazer arranged a site visit, the purpose of which, the Hobbs were told, was "to involve someone from the Corps of Engineers, the regulatory agency, to make a more definitive call over whether the activities and the site would be regulated under Section 404 of the Clean Water Act." JA 392. Mr. McGlaun of the Corps testified Mr. Frazer "[c]alled me and asked if I would accompany him to a site in the Ware Neck vicinity to determine whether or not an area that he felt was within our jurisdiction was, in fact, within our jurisdiction," and that when they arrived at the Hobbs' property, "[w]e walked a portion of the property to see what had been—what work had already been

[1] The District Court found that after chemical tests of the water in the ditches, "Those tests show a very high water quality currently coming off the property, a water quality that meets both the EPA and the State Water Control Board's drinking water standards." App. 26a.

performed and, to the best of our ability, make a jurisdictional determination as to whether or not the work was within the Corps of Engineers' jurisdiction." JA 440-441.

The site visit occurred on October 4, 1988. Paul Hobbs testified that when Mr. McGlaun left the property he told him ". . . that he didn't see where we had, you know, done anything wrong . . . and he would get back to us." JA 494-495. Mr. McGlaun never got back to the Hobbs JA 496, never told the Hobbs the Corps had jurisdiction JA 465, never told the Hobbs they needed a permit from the Corps JA 465, and never told Paul Hobbs to stop the ongoing work. JA 466. Mr. McGlaun testified that from the date of the site visit to the date of the Hobbs' trial he has never issued a Cease and Desist Order to the Hobbs, which the Corps Regulations, 33 C.F.R. § 326.3, require be issued when a violation exists. JA 464-465. App. 144a.

At Mr. Frazer's office immediately after the October 4, 1988 site visit Mr. McGlaun told Mr. Frazer ". . . that I felt like unless we could have a consensus of all sites meeting the multiparameter approach, it would be too vague and too gray and that we would not want to assert jurisdiction" (JA 450), and "[t]hat it would be difficult because it is not the type of area that the Corps normally likes to become involved in." JA 451. Mr. McGlaun specifically told Mr. Frazer that unless a wetland delineation was done using the Corps' Manual he would not take any action. JA 456-457. Mr. McGlaun reported the results of the October 4, 1988 site visit to his department head in the Norfolk District Corps, Mr. Poore, and to Ms. Steele, Mr. McGlaun's immediate superior and, ". . . told them that Gary Frazer was going to refer this to EPA if the Corps didn't assert jurisdiction, and Mr. Poore told me to go ahead and let Gary Frazer refer the property or the situation to EPA." JA 452.

Mr. McGlaun testified at trial that the Corps has never determined that the Hobbs' work was unauthorized. "I have not. I have never determined that that is an un-

authorized—or that is a 404 area." [2] JA 465. The Corps is the sole permitting agency under Section 404 of the CWA.[3] JA 342-343, 381, 392. To determine whether jurisdiction existed to require a Section 404, CWA permit in this case, the Norfolk District Corps required that the standards and procedures set out in the Corps' Wetlands Delineation Manual ("Corps Manual") be applied to a particular property to determine whether it met the regulatory definition of a wetland, 33 C.F.R. § 328.3(b). App. 145a; JA 454-457. The Corps would not accept wetland jurisdictional determinations using the EPA Wetlands Manual, Revised Interim Final Edition of April 1988 ("EPA Manual"). JA 456-457. After the October 4, 1988 site meeting Mr. Frazer submitted data to his superiors at F&WS reflecting that he claimed only 2 of 5 sites he examined on the Hobbs property were wetlands pursuant to the Corps' Manual, but that all 5 sites "would be wetlands under EPA methodology".[4] JA 159. After formal written requests from the EPA on November 17, 1988 (JA 157) and the F&WS on December 12, 1988 (JA 159) that the Corps assert CWA jurisdiction over the

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[2] During the Government's case the District Court pointed out this problem to the Government's Counsel. "So at the threshold level, before you can have a violation of Section 1311—and the Army Corps of Engineers is the only permitting authority under this statute. The EPA can't go out and determine whether to issue permits or not issue permits. The Army Corps of Engineers does that. Now, maybe your evidence is going to show they are willing to assume jurisdiction and require permits, but so far it doesn't, and in fact it looks like it may be to the contrary. So you have certainly got a problem in that regard on Count I. If your permitting authority isn't willing to take jurisdiction, it would be difficult to have a violation." Trial Transcript at 335-336.

[3] The Court of Appeals erroneously determined that the EPA has authority to issue Section 404 permits. App. 8a. Only the Secretary of the Army, by delegation to the Chief of Engineers and further to District Engineers, has authority to issue Section 404 permits. 33 U.S.C. § 1344(a) and (d). App. 139a.

[4] The Court of Appeals acknowledged that, "the EPA Manual does represent a significant change in the definition [of a wetland] and an expansion of jurisdiction." App. 10a.

Hobbs property and require the Hobbs to obtain a permit, the Corps did not do so.[5]

The EPA, with no prior notice or opportunity to be heard given to the Hobbs, issued a Findings of Violation and Order for Compliance to the Hobbs on March 23, 1989 (App. 118a.), which was amended on April 25, 1989 (App. 126a.) after the Hobbs asserted that their property was not adjacent to the Ware River (collectively, "EPA Orders"). Both of EPA's Orders alleged that *the Hobbs had violated Section 404 of the CWA by filling wetlands without a permit from the Corps.*[6] App. 124a. and 132a. In part, because the Hobbs had been told that the Corps was the agency that had jurisdiction and would say whether or not a permit was required, and because Mr. McGlaun of the Corps had been at the site on October 4, 1988 specifically to make a determination of jurisdiction, the Hobbs in a good faith belief that the EPA's Orders were in error did not comply, although Paul Hobbs did stop all work. JA 496-500. Phil Hobbs had not done any work on his property since the summer of 1985. JA 478-479.

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[5] The Court of Appeals' finding that ". . . nothing in the record suggests that the Corps actually refused to exert jurisdiction over the Hobbs' property through a wetlands determination" is inexplicable. App. 7-8a. In addition to Mr. McGlaun's site visit and discussions with his superiors, the formal request to assert jurisdiction from F&WS specifically stated F&WS "made wetland determinations" and enclosed "field forms . . . for both the Corps and [EPA] methodologies". JA 160. The formal request to assert jurisdiction from EPA specifically stated "one of our field biologists visited the site to verify the fact that the site was being converted from PFOIA forested wetlands into hayfields." JA 157.

[6] Compliance with the EPA's Orders required, among other affirmative acts, plugging the ditches and submission of a plan for restoring much of the property to the condition it was in prior to the work the Hobbs had performed over the previous 9 years under the SCS's supervision. The Court of Appeals held that the Government is not estopped under the facts of this case and that ruling has not been appealed. App. 13a.

Having no administrative remedy to assert their belief in the invalidity and inapplicability of the EPA Orders, and knowing their property was not adjacent to the Ware River or tributaries of the Ware River as alleged in the EPA Orders, the Hobbs filed a suit for Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 in the District Court asserting jurisdiction pursuant to 28 U.S.C. § 1331. JA 19. The Hobbs obtained a Temporary Injunction preventing the Government from further enforcing the EPA Orders and allowing the Hobbs to continue to harvest their hay. JA 59. The Hobbs' Complaint was later dismissed for lack of subject matter jurisdiction and the Government's Counterclaim pursuant to section 309 (b) of the CWA, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331, 1345 and 1355, for civil penalties of potentially more than $66,975,000, was permitted to proceed at trial.[7] App. 102a. The trial was bifurcated into liability and penalty phases.

Mr. Frazer and representatives of the EPA performed further wetland studies using the EPA Manual adopted in April 1988 and a Federal Manual adopted in 1989 ("Federal Manual"). JA 402-403. No wetland studies were done using the standards of the Corps Manual. All wetland experts testified that application of the EPA Manual and the Federal Manual effective on March 20,

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[7] The actual total of civil penalties to which the Hobbs were exposed was clearly debilitating. From 1980 through February 4, 1987, each day discharged material remained on the ground was a separate violation subject to a $10,000 civil penalty, 33 U.S.C. § 1319(d). App. 139a. The CWA penalty provisions were increased to $25,000 per day after February 4, 1987. App. 138a. From 1980 through the District Court's judgment, the unpermitted discharge claim alone exposed the Hobbs' to the potential of $42,675,000 in civil penalties. In addition, failure to comply with the EPA Orders constituted a *separate per day violation* of $25,000 for each day the Hobbs did not comply. Because the Hobbs' Complaint for Declaratory Judgment which supported the Temporary Injunction was dismissed for lack of subject matter jurisdiction, the Hobbs were exposed to $12,150,000 each in additional civil penalties for failure to comply with EPA Orders. App. 10a.

1989, after all of Phil Hobbs' and much of Paul Hobbs' work had been completed, expanded the jurisdictional reach of Section 404 of the CWA because it allowed them to determine property to be a wetland using the Corps Regulatory definition 33 C.F.R 328.3(b), which they would not have been able to do, applying the standards of the Corps' Manual.[8] JA 373, 381-382, 390-391, 412-415, 463 516-517. In response to special interrogatories propounded by the District Court, the jury found that the Hobbs filled wetlands as defined by 33 C.F.R. § 328.3 (b). App. 97a. and 100a.

All witnesses including the Government's own photo interpreter testified at trial that the waterways on the Hobbs property were mandug drainage ditches and that they were non-tidal. JA 363-368. Paul Hobbs testified that they were mandug, non-tidal drainage ditches dug on dry land. JA 499. An EPA expert witness marked the point on an Exhibit where in his opinion tributaries to the Ware River stopped and mandug drainage ditches began. This point was well short of the Hobbs property lines. JA 358-363. Notwithstanding that prior Corps Regulations, in effect when Phil Hobbs did the work on his property (App. 141a.) state that mandug non-tidal drainage ditches are not tributaries and the Corps regulations effective since January 12, 1987, in effect when Paul Hobbs did the work on his property (App. 143a.) state in the Preamble that the Corps did not normally consider mandug, non-tidal drainage ditches dug on dry land to be "waters of the United States" defined at 33 C.F.R. § 328.3(a)(1-7) (App. 144a.) the District Court refused to so instruct the jury. JA 232. The District Court also refused to instruct the jury that the use of the word "neighboring" in the regulatory definition of adjacent (wetlands), 33 CF.R. § 328.3(c) (App. 145a.) must be given the same meaning as "contiguous" and "bordering" or be unconstitutionally "void for vagueness".

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[8] The Court of Appeals agreed, ". . . the EPA Manual does represent a significant change in the definition and an expansion of jurisdiction." App. 10a.

Finally the District Court refused to instruct the jury that the Hobbs had the right to rely upon their good faith belief that the EPA Orders were incorrect or inapplicable as an absolute defense to Count II of the Complaint which sought civil penalties of $25,000 per day for each day the Hobbs did not comply. JA 236; App. 114a. In response to special interrogatories the jury found that the Hobbs violated the EPA Orders. App. 99a. and 101a. Because the Hobbs conceded that they did not have a permit, the District Court ruled that no issue of fact was presented and refused to allow the jury to determine if the Hobbs discharged, without a permit required by the Corps. App. 62a-63a.

At the conclusion of the penalty phase of the trial Phil Hobbs was fined $100 and Paul Hobbs $200. App. 19a. Twenty five acres of Paul Hobbs' land must be allowed to revegetate naturally (App. 18a.) and the Hobbs must implement a restoration plan which will cost Phil Hobbs $105,400 and Paul Hobbs $128,000 before they can change the agricultural use of the land to another agricultural use. App. 17a and 31a.

The Hobbs appealed. The Court of Appeals affirmed, finding no merit in the Hobbs' argument ". . . that because the Corps did not find that the Hobbs were discharging pollutants into wetlands nor requiring them to secure a permit, the EPA has nothing to enforce." App. 7a. The Court of Appeals held that "the discharge itself is illegal." App. 8a. The Court of Appeals expanded this Court's holding in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("Riverside Bayview Homes") to include wetlands on the Hobbs property which do not "actually abut on a navigable waterway", 474 U.S. at 135, and included "wetlands that are not adjacent to bodies of open water." 474 U.S. 132 n.8 App. 11a. The Court of Appeals rejected the Hobbs' claim that the term "neighboring" found in the regulatory definition of "adjacent", 33 C.F.R. § 328.3(c), is void for vagueness. App. 11a. The Court of Appeals also rejected the Hobbs claim

that constitutionally mandated due process required that they be permitted to assert their good faith belief defense to the EPA's Orders, as a factually disputed issue to the jury during the liability phase of the trial, holding that the Hobbs are afforded constitutionally adequate process because the District Court considered these claims during the penalty phase of the trial. App. 12-13a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals is in conflict with the decisions of other Circuits which hold that under Section 404 of the CWA, the Corps' decision to assert jurisdiction and require a permit is discretionary and until the Corps has determined whether or not it has jurisdiction and a permit is required, the Courts have no jurisdiction to interfere. The Court of Appeals has permitted a lay jury to make a wetland determination using standards which the permitting agency, the Corps, refuses to recognize, which .e other Circuits have held not even the District Court has jurisdiction to make. This case demonstrates faulty statutory construction of Section 404 of the CWA and the unwarranted expansion by the Court of Appeals of this Court's decision in *Riverside Bayview Homes, supra*, expanding federal regulatory jurisdiction over as much as 4,400,000 acres of private wetland property converted, mostly for agricultural purposes, nationwide since 1980 into "waters of the United States".[9] This decision subjects the owners of these millions of acres of expanded "waters of the United States" to retroactive enforcement actions by the EPA seeking millions of dollars in civil penalties in each case. The future implications of this case upon private property owners whose property is not "bordering" or "contiguous" to any "water of the United States" are dependent only upon the subjective standards applied by a jury that the wetlands are "neigh-

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[9] *See*, Tiner, Ralph W., Jr., *Mid-Atlantic Wetlands: A Disappearing National Treasure*, June 1987, a cooperative publication of the U.S. Fish & Wildlife Service and the U.S. Environmental Protection Agency; Scodari, Paul F., 1990 *Wetlands Protection: The Role of Economics*, Env. Law Institute, Washington, DC.

boring", or as the Court of Appeals believes is supported by this Court's holding in *Riverside Bayview Homes, supra*, "in reasonable proximity to other waters of the United States." These private property owners and the federal agencies which seek to regulate their private property as "waters of the United States" pursuant to Section 404 of the CWA are in need of this Court's guidance, by answering the question left unanswered in *Riverside Bayview Homes, supra.*[10] Finally, the denial of the constitutional right of a citizen to assert a good faith belief in the invalidity or inapplicability of an Administrative Order issued by a federal agency as a complete defense to liability for civil penalties of $25,000 each day the Order is not complied with, where no remedy exists to contest the Order's validity, save-noncompliance, raises a substantial constitutional issue. This Court should grant certiorari to resolve these issues.

I. A NON-PERMITTING FEDERAL AGENCY, MAY NOT BRING AN ENFORCEMENT ACTION USING ITS OWN AND DIFFERENT STANDARDS, WHEN THE PERMITTING FEDERAL AGENCY DECLINES TO ASSERT JURISDICTION AND REQUIRE A PERMIT USING ITS OWN STANDARDS

The Court of Appeals is incorrect as a matter of law in holding that both the Corps and EPA have authority to issue permits under Section 404 of the CWA.[11] The EPA in its own regulations, 40 C.F.R. § 230.3(n) (1988) (App. 146a.), acknowledges that the Corps is the sole permitting authority under Section 404 of the CWA. While the Court of Appeals is correct that both the Corps

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[10] "We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into *wetlands that are not adjacent to bodies of open water*, see 33 C.F.R. §§ 323.2(a)(2) and (3) 1985 and we do not express any opinion on that question." 474 U.S. at 132 n.8 (emphasis added).

[11] *See*, App. 8a. ("*EPA would not be much of an authority if it could* make wetlands determinations, *issue permits*, but could not enforce the very rule for which those permits provide the exception.") (emphasis added).

and EPA have enforcement authority under the CWA, Congress did not grant permitting authority to the EPA under Section 404 of the CWA.[12] App. 139a.

Congress, in Section 404 of the CWA, explicitly and without equivocation gave authority to determine jurisdiction and the requirement of a permit *solely to the Secretary, by delegation here to the Norfolk District Engineer, and no other federal agency.* App. 139a. Nothing in Section 404 of the CWA gives the Administrator the right to make "jurisdictional determinations" or substitute his judgment of when a Section 404(a), CWA permit is required. Until the Corps has exercised its discretionary authority pursuant to 33 U.S.C. § 1344(a), the question of whether or not "the discharge of any pollutant" is "in compliance with Section 404" under 33 U.S.C. § 1311(a) is incapable of determination.

The Administrator's only statutory jurisdictional role in the Section 404 permitting program is Section 404(c) "veto" authority over permitting decisions made by the Secretary that have specified impacts, none of which are applicable here, 33 U.S.C. § 1344(c), and the development, in conjunction with the Secretary, of guidelines for the Secretary's permit decisions. 33 U.S.C. § 1344(b). App. 139a. These guidelines are not issued on a case by case basis as each permit application or decision is made, rather they are applicable to all permit applications submitted to the Corps. *See*, 40 C.F.R. §§ 230.1-230.80.

Because the evidence was uncontradiced that the Corps has never determined that the Hobbs required a Section 404 permit for the activities the EPA alleged in this case were "not in compliance with Section 404" of the CWA, the Hobbs moved for a Directed Verdict at the close of the Government's case and again at the conclusion of all

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[12] Section 404 of the CWA is totally distinguished from other permit programs of the CWA which the EPA administers as the permit authority. *See*, 33 U.S.C. § 1342 (National Pollutant Discharge Elimination System, NPDES).

evidence.[13] No evidence was presented by the Government that the Hobbs committed the Section 301(a) violation with which they were charged by the EPA. The Government's own witnesses conceded that if the Corps did not assert Section 404, CWA jurisdiction over property or require a permit that there would be no violation of the CWA for discharging dredged or fill material onto that property. JA 336-337, 384-387. Both the District Court (App. 59a.) and the Court of Appeals (App. 8a.) held that because the Hobbs did not have a permit, even if the permitting agency, the Corps, did not require one, an enforcement action alleging an unpermitted discharge by the EPA is nevertheless authorized.[14]

The Secretary's exercise of, or refusal to exercise, his discretionary authority pursuant to Section 404 of the CWA is only subject to arbitrary and capricious judicial review pursuant to the citizens suit provision of the CWA, 33 U.S.C. § 1365, and the APA, 5 U.S.C. 551 *et seq. See e.g, Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 902 n.11 (5th Cir. 1983) ("We have held that enforcement of the CWA is not a 'mandatory duty.'") (citation omitted)[15] *See also, Heckler v.*

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[13] Mr. McGlaun of the Corps testified, "I have not. I have never determined that that is an unauthorized—or that is a 404 area." JA 465.

[14] The District Court stated ". . . but even if they had applied, for the sake of argument, for a permit and the Army Corps of Engineers had made a determination that a permit wasn't necessary because there weren't jurisdictional wetlands involved I'm of the opinion that the EPA could still go forward with an enforcement action." App. 90a.

[15] *See, Orleans Audubon Soc.* v. *Lee*, 742 F.2d 901, 904 (5th Cir. 1984) ("*Orleans* concedes that we normally must review decisions of the Corps under the arbitrary and capricious standard and it concedes that decisions not to require permits for actions by private developers, such as those at issue here, are usually considered to be discretionary."). *See, also, Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers*, 700 F. Supp. 1549, 1550-1551 (N.D.Cal. 1988) ("When it learned from the Perkins deposition that the Corps had disclaimed jurisdiction on November 7, the EPA

Chaney, 470 U.S. 821 (1985) (Absent statutory method of review, agency's decision not to take enforcement action presumed immune from review).

The split in the Circuit decisions presented in the instant case is unusual in that it occurs *sub silentio*. No other Circuit has found a Section 301(a), CWA violation, because of a discharge *without a Section 404 permit*, without the permitting authority, the Corps, having asserted the requirement for a permit.[16] Even in those cases where a wetland determination made by the Corps has been determined to be deficient, other Circuits limit the District Court's jurisdiction to remand to the Corps for a proper wetland determination.[17]

In the instant case the Court of Appeals has held that when the Corps did not make a detailed wetland determination (App. 8a.), a lay jury may do so based upon evidence presented by non-permitting authorities using an EPA Manual, which did not exist until 8 years after the Hobbs began work, which the Corps did not recognize, and the 1989 Federal Manual which did not exist when the Hobbs did any of the work.[18] The Hobbs jury was permitted to disregard the Corps' Manual, which the Corps required be used (JA 456-457), use whatever evidence it found appropriate from non-Corps expert

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voluntarily withdrew its January 12 Findings and Order, declaring them null and void."); *N.W.F.* v. *Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987) (citizens suit, holding enforcement decision is discretionary).

[16] *See, e.g., U.S.* v. *Marathon Development Corp.*, 867 F.2d 96, 97 (1st Cir. 1989); *Avoyelles, supra*, 715 F.2d at 901; *Hoffman Group, Inc.* v. *U.S.E.P.A.*, 902 F.2d 567, 568 (7th Cir. 1990); *U.S.* v. *Lambert*, 695 F.2d 536, 539 (11th Cir. 1983).

[17] *See*, footnote 19 *infra*.

[18] The jury found that Paul Hobbs did not discharge a pollutant into wetlands in 1989. App. 98a and Phil Hobbs had not discharged a pollutant into wetlands since 1985. App. 101a.

witnesses who used the standards of the EPA Manual and the 1989 Federal Manual and instructed by the District Court to find whether or not wetlands existed on the Hobbs property by applying the Corps regulatory definition of a wetland, 33 C.F.R. § 328.3(b). App. 144a. Thus, the Court of Appeals in this case has split with the other Circuits by sanctioning a lay jury's "de novo wetland determination", which all other Circuit Courts have, until the instant case, held not even a District Court has jurisdiction to make.[19]

In the instant case the Court of Appeals held that the permitting authority's requirement that a permit is necessary is irrelevant: "[u]nder 33 U.S.C. § 1311(a) the discharge of a pollutant is illegal 'except' as in compliance with sections authorizing permits . . . thus the discharge itself is illegal." App. 8a. In *Orleans Audubon Soc.*, *supra* at n.15, the landowner did not have a Section 404, CWA permit because the District Engineer had determined that no permit was required. Under circumstances similar to the Corps reliance upon its field scientist, Mr. McGlaun, in the instant case, the Fifth Circuit refused to find a District Engineer's decision not to require a permit to be arbitrary and capricious under the citizens

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[19] *Avoyelles*, 715 F.2d at 906 ("The wetlands determination is precisely the type of agency decision that is normally subject to limited judicial review . . . De novo review would permit the courts to intrude into an area in which they have no particular competence, and the presentation of the scientific evidence at both the administrative and judicial levels of the proceedings would result in inefficiencies and delays where they are most harmful.") and *Id.* at 903 n.14 ("The private defendants now concede that the Court below was without power to substitute its own wetland determination for that made by the agency. The role of the Court ended upon a finding that the jurisdictional determination made by the agency was not proved. Remand was the only appropriate judicial action."); *Orleans*, 742 F.2d at 907 ("On the other hand, if the decision represents a valid exercise of the Corps' decision-making powers, then this Court should not interfere with the Corps' judgment. *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 824.").

suit provision of the CWA and the APA.[20] In the instant case the Court of Appeals has held that when the field scientists of the F&WS and EPA disagree with the Corps and its field scientist, the property owner can be the recipient of an Administrative Order and a subsequent enforcement action for millions of dollars in civil penalties, despite the fact that the Corps has *never* asserted the requirement for a Section 404 permit.

The Court of Appeals is simply wrong in stating, "[m]oreover, nothing in the record suggests that the Corps actually refused to exert jurisdiction over the Hobbses property through a wetlands determination." App. 8a. After being specifically requested by formal written requests from the EPA on November 17, 1988 (JA 157) and the F&WS on December 12, 1988 (JA 159) to assert jurisdiction and require the Hobbs to obtain a permit, the Corps declined to do so. These formal requests to assert jurisdiction over the Hobbs property and require a permit contained Wetland Determination Data Sheets applying both the EPA's and the Corps' standards for determining jurisdiction, and referenced those agencies' representatives as having visited the property and determined it to be wetlands. *Id.* The Corps' enforcement officials testified that the Corps did not assert jurisdiction over the Hobbs property and require a permit after these formal requests, and that both requests were received after the Corps' field investigator had made his investigation of the Hobbs property on October 4, 1988 *specifically* for the purpose of determining

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[20] *Orleans*, 742 F.2d at 911 ("Relying on this report, and having no concrete information which would indicate that the field inspector was in error, Colonel Sands agreed that the Corps had no jurisdiction under section 404 to require C.I.T. to obtain a permit for the culvert installation. His reliance on this report appears to have been in good faith, and we find no basis for holding that Colonel Sands decision was arbitrary or capricious. Even assuming that the report was erroneous, we cannot find in the record before us any indication that Colonel Sands' reliance upon the findings of the field investigator was so unreasonable as to indicate that the Corps' handling of this matter was actionable under the APA.").

if the Corps had jurisdiction and a permit would be required.[21] JA 389, 940, 440-441, 465.

The injustice in this case is readily apparent. The F&WS and EPA, dissatisfied with the Corps' decision not to assert Section 404, CWA jurisdiction over the Hobbs property and require a permit, issued the EPA Orders and subsequently filed this enforcement action seeking what could have been more than $66,975,000 in civil penalties against the Hobbs.[22] Although the United States

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[21] The Hobbs concede that the Corps never issued a formal letter to the EPA and F&WS stating that the Corps refused to assert jurisdiction. However, the lack of a formal response of any kind was not relevant to the Court of Appeals' determination. The Court of Appeals held that because the Hobbs did not have a permit, irrespective of the reason, the Hobbs violated the CWA. App. 8a. Even if the Corps had issued a formal letter that there was no CWA jurisdiction and no permit was required, the Hobbs would not have had a permit and under the Court of Appeals' decision would have violated the law. *Id.*

[22] The Court of Appeals relied upon *Avoyelles* as authority for this transfer of a permit program entrusted by Congress to the Corps under 33 U.S.C. § 1344(a) to the EPA. However, the Court of Appeals failed to appreciate that, unlike the instant case, where the Corps has never asserted Section 404 authority and the requirement for a permit and so notified the property owner through a cease and desist order, the Corps did in *Avoyelles*. *See, supra* at n.16. Nor did the Court of Appeals give any weight to the differing jurisdictional results obtained by applying the Corps' Manual, the EPA Manual and 1989 Federal Manual. *Compare Avoyelles* at 911 n.27 ("Heightened deference is due an agency' interpretation of "its own" regulations. Although *here it was the EPA that applied the Corps' definition in making the final wetlands determination*, we see no reason to lessen our deference in this case. *The methodology was developed through consultations between the Corps and EPA*. Further, the EPA subsequently added the same definition to its own regulations. 40 C.F.R. §§ 230.3(t), 230.41(a)(1) (1982). *On appeal both agencies have offered the same interpretation of "their own regulations."*) (emphasis added). The Court of Appeals in the instant case found unimportant the lack of evidence that any "discharge" occurred in a "wetland" as determined by the Corps' Manual, and that the Corps did not assert at trial a permit was required. Undaunted, the EPA proceeded on its own standards, not the Corps, which the Court of Appeals concedes, "does represent a significant

was the named Plaintiff it was the EPA and not the Corps that instituted this enforcement action against the Hobbs.[23] In Mr. McGlaun's 13 years with the Corps, it is the Corps and not the EPA that makes these determinations.[24]

The Court of Appeals decision in this case is likely to be recurring because it sanctions Section 404, CWA enforcement actions by the EPA against the owners of millions of acres of land throughout the United States, converted to other uses since 1980, irrespective of the Corps' position, either expressly or through application of its standards, that jurisdiction did not exist and a permit was not required. The EPA now has judicial authority to apply its jurisdictional standards rather than the jurisdictional standards established by the permitting authority authorized by Congress. Even in those cases where the Corps has determined that no jurisdiction existed and a permit was not required, EPA Administrative Orders and enforcement actions have now been judicially sanctioned, with the only issue necessary to imposition of civil and criminal penalties being *did the property owner have a permit.* The only means by which a property owner can insulate himself from an EPA Administrative Order which requires the restoration of nine years of work or face the potential of ruinous civil penalties is by *actually having a permit*, even if nine years ago

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change in the definition [of a wetland] and an expansion of jurisdiction." App. 10a.

[23] Mr. Carson: Well, the Corps isn't bringing this case, Your Honor. He is a Corps employee.

The Court: Who is bringing it?

Mr. Carson: The EPA.

The Court: I thought it was the United States that was the named Plaintiff.

Mr. Carson: Well, that's true, Your Honor. JA 480.

[24] The Court: But basically, in your experience then, it has been the Corps who has been making these field inspections and determinations in this area.

The Witness: Yes, ma'am, since we are the permitting authority. JA 457-458.

the Corps said no jurisdiction existed and a permit was not required.

II. PRIVATE PROPERTY WHICH DOES NOT ACTUALLY ABUT ON OR BORDER A "WATER OF THE UNITED STATES" IS NOT SUBJECT TO THE REQUIREMENTS OF A SECTION 404, CWA PERMIT BEFORE THE LAND MAY BE DISTURBED

At trial, the Hobbs moved for a directed verdict because the evidence failed to establish jurisdiction, i.e., that wetlands, even if they existed, were adjacent to mandug, non-tidal drainage ditches dug on dry land and therefore were not wetlands adjacent, 33 C.F.R. § 328.3 (a)(7), to other "waters of the United States" as defined by 33 C.F.R. § 328.3(a)(1-6).[25] When this motion was denied, the Hobbs proffered a Jury Instruction requesting that the District Court instruct the jury that, from July 19, 1977 through July 22, 1982, the Corps explicitly excluded "man-made, non-tidal drainage and irrigation ditches excavated on dry land" from the definition of tributaries contained within the jurisdictional definitions of "waters of the United States." App. 141a. The Hobbs further requested that the District Court instruct the jury that the Corps regulations effective January 12, 1987, through the time of trial, explicitly stated in the Preamble that, "We generally do not consider the following waters to be 'waters of the United States': (a) non-

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[25] Defining the terms "navigable waters of the United States" and "waters of the United States" is synonymous with jurisdiction. If the property is not a "water of the United States" there is no jurisdiction pursuant to Section 404 of the Clean Water Act to require a permit. 33 C.F.R. 328.3(a)(1-7). *See, Riverside Bayview Homes*, 474 U.S. at 132 ("In determining the limits of *its* power to regulate under the [Clean Water] Act, the Corps must necessarily choose some point at which water ends and land begins.") The District Court noted the importance of this jurisdictional requirement, "On the other hand, in this case *the Court wouldn't have jurisdiction over these wetlands if they weren't adjacent to the Ware River or one of its tributaries*, so the Court has to take that into consideration." App. 29a. (emphasis added).

tidal drainage and irrigation ditches excavated on dry land. . ." App. 143a. JA 232. The District Court refused to so instruct the jury.

The Court of Appeals and the District Court were required, but refused, to give deference to the interpretation of the statute given by the agency administering it.[26] None of the Corps' definitions of "waters of United States", which wetlands must be adjacent to, include non-tidal drainage ditches. *See*, 33 C.F.R. § 328.3(a)(1-6) App. 144a. The lack of inclusion of non-tidal drainage ditches in the Corps definitions of "waters of the United States", and its regulatory exclusion of such drainage ditches as "waters of the United States" in the Preamble, demonstrate that the Corps *did not* prior to 1982, and does not now, consider drainage ditches to be bodies of open water or "waters of the United States" over which the Corps asserts jurisdiction under the CWA. *See*, 33 C.F.R. § 323.2(a) (1977). App. 142a.

The Hobbs do not dispute that their drainage ditches are hydrologically connected to the Ware River, as the Court of Appeals notes. App. 11a. Common sense compels recognition of the fact that *all drainage ditches* throughout the United States ultimately form a hydrological connection at some point to a water body which is pursuant to the Corps Regulations a "water of the United States". The Court of Appeals' reliance upon a hydrological connection as sufficient to bring wetlands adjacent to drainage ditches into regulation as "adjacent within the meaning of the statute" (App. 10a.) disregards the Corps' interpretation of the statute, which the Court of Appeals was required to grant great deference and expressly violates this Court's decision in *Riverside Bayview Homes*, *supra* that, ". . . the Corps must neces-

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[26] *See, Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) ("When faced with the problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Riverside Bayview Homes*, 474 U.S. at 131 (according deference to the Corps' interpretation of Section 404 of the CWA.)

sarily choose some point at which water ends and land begins." 470 U.S. 132.[27] Rather than deferring to the Corps' interpretation of the statute, the Court of Appeals has substituted its judgment for the Corps.[28]

The Court of Appeals ignored that under this Court's holding in *Riverside Bayview Homes, supra* wetlands adjacent to drainage ditches would not be subject to regulation, *if the Corps itself*, excludes drainage ditches from its definition of waters of the United States.[29] This Court emphasized that its holding in *Riverside Bayview Homes, supra* was limited to those wetlands adjacent, i.e., which "actually abuts on a navigable waterway" which are bodies of open water.[30]

This Court should grant this Petition to answer the uncertainty left by *Riverside Bayview Homes Inc., supra,*

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[27] The Court of Appeals' reference to "adjacent" as "the express language of the statute" is incorrect. App. 11a. The CWA does not contain a definition of adjacent. This definition is contained in the Corps Regulations at 33 C.F.R. § 328.3(c). App. 145a. The same definition is found in the EPA's Regulations at 40 C.F.R. § 230.3(b). App. 146a.

[28] Relying on dicta in *Riverside Bayview Homes, supra* the Court of Appeals determined that ". . . the landward limit of Federal jurisdiction under Section 404 *must include any adjacent wetlands that* form the border or *are in reasonable proximity to other waters of the United States* as these wetlands are part of this aquatic system" to support its refusal to defer to the Corps' Regulations defining the extent of its jurisdiction under Section 404 of the CWA. App. 11a. (emphasis added)

[29] "Again, *we cannot say that the Corps' judgment on these matters is unreasonable*, and we therefore conclude that *a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway*, respondent was required to have a permit in this case." 437 U.S. 135. (emphasis added).

[30] "We are not called upon to address the question of the authority of the Corps to regulate discharge of fill material into *wetlands that are not adjacent to bodies of open water*, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985) and we do not express any opinion on that question." 474 U.S. at 132 n.8 (emphasis added).

which is likely to be recurring and define for the regulatory agencies and the regulated community how far landward the private property of citizens, "adjacent" to drainage ditches, may be regulated under Section 404 of the CWA, as "waters of the United States".

III. THE REGULATORY DEFINITION OF "ADJACENT" WETLANDS WHICH CONTAINS THE SUBJECTIVE STANDARD OF "NEIGHBORING" IS VOID FOR VAGUENESS

Central to this enforcement action seeking civil penalties which could have exceeded $66,975,000 was the Hobbs defense that their property was not adjacent to the Ware River or one of its tributaries. As the trial evidence conclusively demonstrated the Hobbs property was not "contiguous" or "bordering" to the Ware River or one of its tributaries. It is undisputed that the Hobbs property was connected hydrologically and could be "neighboring" depending upon how such a subjective standard was applied.[31] The Hobbs objected to the District Court's instruction of "adjacent" without the further instruction that the term "neighboring" as used in the Corps definition of "adjacent", 33 C.F.R. § 328.3(c), is to be given the same meaning or a meaning consistent with the terms "bordering" and "contiguous". The District Court's instruction allowed the Jury to determine that "adjacent" *could mean any physical distance* the jury determined to be "neighboring" to a "water of the United States". As instructed, the jury was permitted to render a standardless verdict on the factual issue of whether any of the Hobbs property was "adjacent" to a "water of the United States" and therefore itself a "water of the United States". 33 C.F.R. § 328.3(a)(7).[32] In affirming, the

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[31] Neither the definition of "adjacent" in the Corps' Regulations, 33 C.F.R. 328.3(c) (App. 145a.) or the EPA Regulations, 40 C.F.R. § 230.3(b) (App. 146a.) which are identical contain any provision that wetlands are adjacent based on a hydrological connection.

[32] Contrary to the Court of Appeals' decision such a geographically standardless jurisdictional reach has never been approved by this Court. *See, Riverside Bayview Homes*, 474 U.S. at 135 ("Be-

Court of Appeals relied upon dicta of this Court in *Riverside Bayview Homes*, *supra* that, ". . . the landward limit of Federal jurisdiction under Section 404 *must include any adjacent wetlands that* form the border or *are in reasonable proximity to other waters* of the United States, as these wetlands are part of this aquatic system. 424 U.S. at 133-134, quoting 42 Fed. Reg. 37,128 (1977) (emphasis added)." App. 11a. The Hobbs seek this Court's clarification that it never intended to approve a literal interpretation of such a subjective standard as "reasonable proximity" when instructing any jury as to the law they are required to apply.

The Hobbs could not determine in advance whether their property was "neighboring" or in "reasonable proximity" to any "water of the United States" so as to subject them to a CWA enforcement action for civil penalties exceeding $66,975,000 for work they had done over a period of nine years. The Hobbs did know that their property was not "contiguous" or "bordering" on the Ware River or its tributaries. It was precisely because the EPA's first Order claimed the Hobbs property was adjacent to the Ware River, (App. 123a.) that after being advised by the Hobbs that their property was not adjacent to the Ware River, the EPA issued the Amended Order claiming that the Hobbs property was adjacent to tributaries of the Ware River. App. 131a.

Refusal to instruct the jury that it must construe the list of definitional terms in a related fashion violated the "familiar principa[l] that 'words grouped in a list should be given related meaning' . . ." as recently instructed by this Court in *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989). Constitutional due process requires that Congress legislate in terms which will inform a citizen of what conduct is required. *See, Connally* v. *General Construction Co.*, 269 U.S. 385 (1925). Where Congress has

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cause respondent's property is part of *a wetland that actually abuts on a navigable waterway*, respondent was required to have a permit in this case.") (footnote omitted) (emphasis added).

delegated to a federal administrative agency authority to define regulatory terms required by the statute, as it has in the CWA, the constitutional due process sufficiency of the notice provided by the statute necessarily depends upon the clarity of the regulation. *United States* v. *Mersky*, 361 U.S. 431, 441 (1960) (". . . businessmen must not be left to guess the meaning of regulations."); *U.S.* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963) (statute "*[m]ust be sufficiently focused to forewarn of both its reach and coverage*".) (emphasis added).[33]

Any argument that this is a "civil" case not subject to the constitutional prohibition against vague legislation must fail.[34] Whether the Government seeks a "civil" penalty, 33 U.S.C. § 1319(d), or criminal "prosecution", 33 U.S.C. § 1319(c), under the CWA the due process concerns are exactly the same, as the factual predicate for jurisdiction is identical, i.e. whether "wetlands" are "ad-

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[33] "The constitutional due process doctrine of void for vagueness is concerned not only with protection of citizens, but equally with preventing arbitrary, discriminatory enforcement and providing clear standards for those charged with enforcing the statute. The doctrine incorporates *notions of fair notice or warning.* Moreover, *it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'* . . . Statutory language of such a standardless sweep allows policemen, prosecutors, *and juries* to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith* v. *Goguen*, 415 U.S. 566, 572-575 (1974) (citations omitted) (emphasis added).

[34] By imposing civil, criminal, and administrative penalties for violation of its prohibitions the CWA is clearly penal legislation. *See e.g., Huntington* v. *Attrill*, 146 U.S. 657, 666 (1892) ("In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, *whether corporal or pecuniary*, imposed or enforced by the State, for a crime or offense against its laws.") (emphasis added) (footnotes omitted).

jacent" (i.e., "neighboring") to "waters of the United States".[35]

Only by the jury's subjective application of the term "neighboring" contained in the District Court's instruction, for which the Hobbs were not forewarned, could the Hobbs property fall within the "reach and coverage" of Section 404 of the CWA and subject them to the potential for civil penalties in this enforcement action.

IV. DUE PROCESS AND THE SEVENTH AMENDMENT REQUIRE THAT A CITIZEN BE PERMITTED TO ASSERT A GOOD FAITH BELIEF THAT A FEDERAL AGENCY'S ADMINISTRATIVE ORDER IS INVALID OR INAPPLICABLE, AS A DISPUTED FACTUAL ISSUE FOR THE JURY TO DECIDE, DURING THE LIABILITY PHASE OF AN ENFORCEMENT ACTION SEEKING CIVIL PENALTIES FOR VIOLATION OF THAT ORDER

At the liability phase of the trial the District Court ruled that the Hobbs would be "strictly liable" if they failed to comply with the EPA's Orders threatening civil penalties of $25,00.00 per day *for the separate and distinct offense of failure to comply, if the Hobbs were found by the jury to have filled wetlands*, because the District Court held that the CWA is a "strict liability statute." JA 309, App. 71a. Notwithstanding that the District Court agreed that the Hobbs failure to comply with the EPA's Orders was a fact issue to be submitted to the jury, (App. 99a; 101a.), the District Court refused to

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[35] *See, Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1953) ("It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. *There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.* If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, *but it would do violence to the well-established principle that penal statutes are to be strictly construed.*") (emphasis added).

allow the Hobbs to present evidence and instruct the jury as requested, that the Hobbs were entitled to assert a good faith belief in the invalidity or inapplicability of EPA Orders served upon them as a *complete defense, irrespective of whether it was ultimately determined that the Hobbs had violated the CWA.* JA 236. App. 71a. The Court of Appeals affirmed the District Court's application of "strict liability." App. 8a.

The Hobbs were entitled to submit this defense, which of necessity, involves issues of fact, to the jury during the liability phase of the trial. This Court specifically held in *Tull* v. *U.S.*, 481 U.S. 412, 425 (1987) (that ". . . the petitioner has a constitutional right to a jury trial to determine his liability on the legal claims." The Court of Appeals ignored this Court's holding in *Tull, supra.*[36]

Assuming, without conceding, that the Court of Appeals is correct ". . . a penalty in some form is mandated. Liability under the Clean Water Act is a form of strict liability," (App. 12a.) it does not necessarily follow that failure to comply with the EPA Orders resulted in strict liability. The violation of Section 404 of the CWA is predicated upon a discharge without a permit, if a permit is required. The EPA Orders were issued in March and April, 1989, and ordered the Hobbs to "Refrain from *all further unauthorized discharge* of dredged or fill material into wetlands or waters at the Respondents' properties. . . ." App. 124 and 132a (emphasis added) The Jury found that Phil Hobbs did not discharge a pollutant

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[36] The Court of Appeals either misunderstood the Hobbs due process argument or believed that due process is satisfied if received in the imposition of a remedy after the jury's determination of liability. "The Hobbs, therefore conclude that the lack of due process protection prior to the imposition of liability for civil remedies violates their due process rights. This contention is without merit. The administrative orders do not in themselves impose penalties. Instead pursuant to CWA § 309(d), the penalties were imposed by the district court following a jury determination that the Hobbses violated the CWA." App. 12a. The Court of Appeals apparently failed to appreciate that violation of the EPA Orders was a separate and distinct claim by the Government for civil penalties. *Id.*

after 1985 (App. 100a.) and that Paul Hobbs did not discharge a pollutant in 1989. App. 98a. The District Court agreed. App. 31a. However, the same Jury found that both Phil Hobbs (App. 101a.) and Paul Hobbs (App. 99a.) failed to comply with the EPA Orders. The Hobbs failure to comply with the EPA Orders was their failure to plug the ditches and submit a plan to the EPA which required restoration of much of their property to its former condition. App. 124a and 132a. The Hobbs failure to comply was not a failure to comply with the CWA, but a failure to comply with restoration which the EPA required and the District Court ultimately refused to implement. The District Court and Court of Appeals by the application of "strict liability" circumvented this Court's holding in *Tull, supra* and prohibited the Hobbs from presenting to the jury evidence of their good faith belief that the EPA Orders were erroneous and the restoration demanded by the EPA was not physically or financially practical and not necessary to address the environmental harm alleged in the EPA Orders. App. 125 and 133a. As the District Court ultimately found, the quality of the water in the ditches met the EPA and State Water Control Board's drinking water standards. App. 26a. Accordingly the restoration demanded by the EPA Orders was clearly inappropriate.

The Court of Appeals' approval of the District Court's linkage of liability upon Count I (violation of the CWA for a discharge without a permit, if required) to liability upon Count II (failure to comply with the EPA Orders) results in precisely the due process deprivation prohibited by this Court. Until there has been a judicial determination of liability, which *Tull, supra* requires be determined by a jury, the claim alleged in the EPA Orders that the CWA has been violated, cannot be established. In the instant case, the Court of Appeals has approved the District Court's *ex post facto* validation of EPA Orders issued in March, 1989 and April, 1989 based upon a Jury Verdict rendered on January 26, 1990, thereby *exposing the Hobbs* to ". . . heavy penalties for violation of commands of an

unascertained quality . . ." which *might be imposed* during the penalty phase of the trial.[37]

Under the Court's decision in *Reisman* v. *Caplin*, 375 U.S. 440, 447 (1964) the Hobbs were entitled to interpose as a defense to the Government's claim for civil penalties for violation of the EPA's Orders a good faith defense to noncompliance, which the *Reisman* Court held to be a *remedy at law*. Otherwise the CWA provisions for EPA's issuance of Administrative Orders and suits to enforce Orders are *unconstitutional on their face*. Beginning with *Ex Parte Young*, 209 U.S. 123, 147-148 (1907) the Court has held that laws are unconstitutional on their face, ". . . when the penalties for disobedience are by fines so enormous . . . as to intimidate the citizen from resorting to the Courts to test the validity of the legislation . . .". In *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 336-337 (1920) the Court again held that the recipient of an Administrative Order had a right to assert the defense, irrespective of the outcome, when the penalty for each days violation was $500. In the instant case Count II of the Government's Counterclaim subjected the Hobbs to civil penalties of $25,000 per day for each day they failed to comply with the EPA's Orders. App. 116a.

The Government cannot and did not dispute that there were no administrative or pre-enforcement judicial pro-

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[37] Each Order given to the Hobbs is ". . . in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoratively determined. Liability to a penalty for violation of such orders before their validity has been determined, would put the party affected in a position where he himself must at his own risk, pass upon the question. He must either obey what may ultimately be held to be a void order, or disobey what may ultimately be held to be a lawful order. If the statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result would inevitably be that the carrier [or the Hobbs] would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid." *Wadley Southern Railway Co.* v. *Georgia*, 235 U.S. 651, 662-663 (1915).

cedures by which the Hobbs could contest the EPA's Orders, thereby distinguishing this case from *Wadley Railway Co.*, *supra* and *Reisman*, *supra* which did provide such a remedy. This trial provided the Hobbs *their only opportunity to challenge the EPA Orders.* The Government admitted that the Hobbs were provided with no prior notice, nor opportunity to be heard concerning the validity of the EPA Orders. JA 92. The District Court's dismissal of the Hobbs Complaint, based in part on the trial courts ruling which was affirmed, *Southern Pines* v. *U.S.*, 912 F.2d 713 (4th Cir. 1990), holding that Congress impliedly intended to preclude District Court review until an enforcement action was instituted, further demonstrates that the Hobbs only opportunity to *contest* the invalidity or inapplicability of the EPA's Orders was in defense of Count II of the Government's Counterclaim, *during this trial.*[38]

The Court of Appeals said in *Southern Pines* v. *U.S.*, 912 F.2d 713, 717 (4th Cir. 1990), "Southern Pines and VICO will have an opportunity to make their constitutional arguments at any enforcement proceeding before they are subjected to any injunction or penalty". The Court of Appeals has now clarified that a litigant's good faith belief defense will not be heard during the trial's liability phase before the jury, but during the penalty phase before the Court. The Court of Appeals has for the second time, held in direct conflict with the Second Circuit, *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2nd Cir. 1974), a conflict resolved by this Court in *Tull* v. *United States*, 481 U.S. 412 (1987), in favor of the right to trial by jury, that a Defendant in a Section 404, CWA enforcement action is not entitled to have the

[38] Until the Court of Appeals' decision in *Southern Pines, supra* it was presumed that the recipient of an Administrative Order under Section 404 of the CWA had Declaratory Judgment access to the District Courts to stay civil penalties, based upon this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225-226 (1961).

issue of his liability for the *separate and distinct offense* of failure to comply with an EPA Order, *fairly submitted* to the jury.[39] Because the District Court refused to permit the Hobbs to explain to the jury why they did not comply with the EPA's demand that they plug the ditches and restore their property, when they had to concede that they did not comply, the Jury's Verdict on the issue of the Hobbs liability for failure to comply with the EPA Orders is nothing more than a directed verdict.

The Court of Appeals has placed the Hobbs and all future recipients of EPA Orders, issued pursuant to Section 404 of the CWA in a *double or nothing position.* If they are found to have violated the CWA they are also *automatically* subjected to the separate and distinct imposition of civil penalties of $25,000 per day for each day they have violated the EPA's Order, subject only to the mercy of the District Court at the penalty phase of the trial. If they are found, not to have violated the CWA, they are not subject to penalties for violating the EPA's Order. As a result of *Southern Pines, supra* the recipient may not challenge the EPA's Order through a Declaratory Judgment action to stay the penalties until the validity of the Order is determined in Court. The recipient must await the EPA's enforcement action as penalties accrue at the rate of $25,000 per day. Because the applicable

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[39] In *Tull* v. *United States*, 481 U.S. 412 (1987) the Court unanimously *held* that where ". . . the Government sought penalties of over 22 million dollars for violation of the Clean Water Act and obtained a judgment in the sum of $325,000 . . . federal courts have rightly assumed that the Seventh Amendment required a jury trial." 481 U.S. 420. Having established that Tull was entitled to a jury trial to determine the factual dispute of liability for a violation of the CWA, there should be no different result for the Hobbs. The Hobbs were entitled to have the jury, rather than the District Court, resolve the factual issue of the Hobbs asserted good faith belief that the EPA's Orders were erroneous or invalid during the liability phase of a trial, which exposed the Hobbs to potential civil penalties of $12,150,000 each, for the separate offense of failure to comply with the EPA's Orders.

statute of limitations is five years, 28 U.S.C. § 2462, the EPA may delay enforcement until the civil penalty exposure reaches $45,625,000. The recipient's only alternative is to submit to what may well be a void EPA Order, a result the Court has held unconstitutional, *Ex Parte Young*, *supra*.

The Court of Appeals has by its decision in this case sent a clear message to the regulated community that when a citizen receives an Administrative Order pursuant to the CWA or any similar federal statute, exposure to enormous fines upon a finding of liability for a violation of the statute, *will automatically result* in exposure to enormous fines for failure to comply with the Administrative Order, no matter how valid the recipient's position that the Administrative Order is erroneous or invalid. This is precisely the coercive intimidation by the Administrative Branch of government of the citizen, the Court has held unconstitutional since *Ex Parte Young*, *supra*. The Hobbs were constitutionally entitled to defend against the EPA's Orders in this case without facing the imposition of potentially ruinous penalties, simply for availing themselves of their only means, administrative or judicial, to contest the EPA's Orders. The Hobbs were entitled, pursuant to *Tull*, *supra*, to have their defense presented to the jury, as a factual issue during the liability phase of their trial.

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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